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No. 83-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF OREGON

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does the Self-Incrimination Clause of the Fifth Amendment require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier admission from the defendant without advising him of his rights, even though the trial court found that the earlier admission was otherwise voluntary, and that it did not "taint" the subsequent confession?

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. James E. Mountain, Jr., Solicitor General of the State of Oregon, Counsel for Petitioner, hereinafter called "State", and Gary D. Babcock, Public Defender, Counsel for Respondent, hereinafter called "defendant". Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-seven times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's specific interest in the instant case arises from our concern that this Court's approval of the decision of the Oregon

Court of Appeals would establish an intolerable rule of law that would implicitly require infallibility on the part of the police by denying them the opportunity of rectifying an error of omission on their part with respect to the *Miranda* decision.

STATEMENT

Two police officers went to the residence of defendant Elstad's parents with a warrant for his arrest in connection with a burglary. After being admitted to defendant's home by his mother and directed to his bedroom where they waited for him to dress, he was taken to the living room by one of the officers while the other one went to the kitchen with defendant's mother. The officer sat down with defendant on a sofa and asked him if he knew why the officers were there. Defendant said he did not. The officer inquired whether defendant knew the victim of the crime. Defendant said he did. Defendant also said that he had heard about the crime. The officer replied that he thought defendant was involved in the burglary, and asked defendant what he knew about it. Defendant responded, "I was there." The officer did not ask any further questions of defendant at that time, nor did he otherwise attempt to clarify the nature or extent of defendant's participation in the crime, if any.

Defendant was then taken to a police station, where he was advised of his rights by a reading from a standard *Miranda* rights card. This was administered by one of the two officers who went to the defendant's home to arrest him, but not by the one who interviewed him. The officer asked defendant if he understood the rights, and defendant answered affirmatively, signed the *Miranda* waiver card, and gave a written confession.

No threats or promises were made to defendant either at his home or at the police station when defendant gave his statement. The trial court found, in denying defendant's

motion to suppress the written confession, that the confession was freely and voluntarily given. The trial court also found that the pre-*Miranda* warning admission did not taint the subsequent confession.

The Oregon Court of Appeals held that the trial court erred in refusing to suppress defendant's written confession. The court concluded, as a matter of law, that the police action in obtaining an admission from defendant in violation of *Miranda* exerted a coercive impact on defendant's later confession, despite the fact that the subsequent confession was preceded by *Miranda* advice and a waiver of rights. *State* v. *Elstad,* 61 Or. App. 673, 678, 658 P.2d 552, 555.

SUMMARY OF ARGUMENT

The summary of argument has already been submitted in the "argument" section of the Table of Contents and in *Amici's* statement of interest.

ARGUMENT

The opportunity for the interrogation of persons suspected of crime is indispensible in many criminal investigations. To deprive the police of that opportunity would produce intolerable consequences. The Oregon court's rule would foreclose that opportunity in cases where the police committed an error of omission with respect to the particular stage of an investigation when the *Miranda* warnings are required. This is compounded by the fact that the courts themselves have experienced difficulty in determining the point at which "custody" begins for *Miranda* warning purposes. This has also been true with regard to the issue as to what constitutes "interrogation."

A recent example of both points is the case of *United States* v. *Mesa,* 638 F.2d 582 (3rd Cir. 1980). This was a case where a person for whom the FBI had an arrest warrant on a charge of shooting both his common law wife and his daughter had barricaded himself, while armed, in a motel room. An FBI agent called to him repeatedly on a bullhorn, urging him to come out. He refused, but agreed to talk on a mobile phone to an FBI negotiator. Their conversation was recorded and in it the suspect made some incriminating statements, after which he peacefully surrendered. A United States district court suppressed the statements on the ground that they were made in a custodial situation, without the suspect having received the *Miranda* warnings. On appeal the circuit court reversed in a 2 to 1 decision. The chief judge concluded that "where an armed suspect who possibly has hostages barricades himself away from the police, he is not in custody [within] the meaning of the *Miranda* rule." Another judge concluded that the FBI agent's conversation with the suspect did not constitute interrogation, and for that reason the warnings were not required. The third judge dissented because he concluded that there was both custody and interrogation, thus necessitating the warnings. (Another recent example of the confusion that prevails is *United States* v. *Bautista,* 684 F.2d 1286 (9th Cir. 1982).)

In the Oregon case the officers probably assumed that there was no custody at the time of the interview in defendant's home and consequently the warnings were not required at that time, although at trial the prosecution conceded that the warnings were necessary. In any event, there was at most an error of omission by officers perhaps not learned in the law. Even if they were well informed, they still may have been confused, as exemplified by the foregoing federal circuit court of appeals case, *United States* v. *Mesa.*

Even assuming that the warnings were required at the time of the defendant's questioning in his home, the fact remains that he later on did receive the warnings while in the police station, prior to the confession he made there. Whatever taint may have attached to the statement in the home was, we suggest, dissipated by the warnings prior to the police station confession.

Over the years, the courts, both state and federal, have held that even when coercive interrogation methods had been used, there was still a possibility of obtaining a legally valid confession later on by properly interrogating the subject under different conditions and circumstances than those which prevailed originally. (The cases are cited in Inbau & Reid, "Criminal Interrogation and Confessions" (2nd ed 1967) 201.) This Court itself, a number of years ago, held to that effect in cases which involved both state and federal prosecutions, despite the Court's "civilized standards" (McNabb-Mallory) concept of confession admissibility in the federal courts which prevailed at that time, and despite the fact that the initial confession in the state case was a coerced one. *United States* v. *Bayer,* 331 U.S. 532 (1947); *Lyons* v. *Oklahoma,* 322 U.S. 596 (1944).

In all of the earlier cases involving this problem the courts said that a presumption exists that the influence of the first improper interrogation was a continuing one. The prosecution, therefore, had the burden of proving that when the suspect confessed later on he was no longer dominated or affected by

the influence of the earlier improper interrogation practices. Moreover, the courts demanded a very high degree of proof to offset the presumption that prevails in favor of the accused.

Amici are not suggesting that the above stated law in cases involving coercion has viability at the present time, nor are we urging that view upon the court in this case where there was no element of coercion. We do urge, however, that if there has been and perhaps continues to be any basis for allowing corrective measures to be taken to salvage a confession of guilt when a coercive practice was used, there should be no reluctance to sanctioning corrective measures with respect to a *Miranda*-flawed confession which does not involve the risk of the acceptance of a confession from an innocent person. Furthermore, there is no need in the latter type of case for a change of interrogation personnel or surrounding circumstances at the time of the second, post-*Miranda* confession. Without the factor of coercion initially, there is no need for insistence upon new personnel or different circumstances at the time of the second confession.

Several federal circuit courts of appeal have had no difficulty in concluding that the proper giving of *Miranda* warnings removes the taint in cases where there has been no police coercion involved in the prior confession or admission, and where the only illegality has been the failure to give the *Miranda* warnings before the first inculpatory statement, *Knott* v. *Howard,* 511 F.2d 1060 (1st Cir. 1975); *United States* v. *Knight,* 395 F.2d 971 (2nd Cir. 1968); *United States* v. *Toral,* 536 F.2d 893 (9th Cir. 1976).

Finally, we suggest that the Court give consideration to two of its decisions which we feel have relevance to the issue in the present case. One is *Harris* v. *New York,* 401 U.S. 222 (1971), holding that a *Miranda*-flawed confession may be used for impeachment purposes. The other is *Michigan* v. *Tucker,* 417 U.S. 433 (1974), permitting derivative use to be made of a confession flawed by the omission from the warnings given the defendant that he was entitled to counsel free of charge.

CONCLUSION

The Oregon appellate court case now before this Court is one of many hundreds that have been spawned by *Miranda*. They have consumed enormous time, effort, and expenditure of funds that could have been put to far better use on matters of considerably greater importance within the judicial system. If this Court were to sustain the Oregon court ruling, it would be akin to sprinkling kerosene on the embers of a fire that never should have been started in the first place.

Not only is it to the best public interest to reject the rule established below in this case, but we recommend, additionally, that at the earliest opportunity this Court should re-examine the *Miranda* mandate as to the justification for its continued existence. (An expanded explanation for this recommendation is presented in Inbau, "Over-Reaction: The Mischief of *Miranda* v. *Arizona*," 73 J. C. L. & Crim. 797-810 (1983).)

Respectfully submitted,

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